

No. 48337-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

vs.

MICHAEL MORIARTY,


Appellant/Cross-Respondent.

Appeal from the Superior Court of Washington for Pacific County

Respondent/Cross-Appellant's Brief

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the Defendant to serve an alternative sentence of electronic home monitoring or a work-release facility.

RESPONSE TO MORIARTY'S ASSIGNMENTS OF ERROR

2. The trial court did not error when it entered findings of fact number 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22.
3. The trial court did not error when it entered conclusions of law numbers 3, and 5.
4. The defendant executed a valid waiver of jury trial and is not entitled to a new trial.
5. The trial court did not misapply the law of self-defense.
6. The State did not commit misconduct in closing argument.
7. Defense counsel provided effective assistance of counsel.
8. There was sufficient evidence to convict Moriarty of second degree assault.

II. ISSUES

1. Did the trial court err when it converted 30 days of Moriarty's sentence to electronic home monitoring or work-release?

RESPONSE TO MORIARTY'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

2. The State has the burden of proof beyond a reasonable doubt and proved this matter beyond a reasonable doubt.
3. The State proved each element of the offense beyond a reasonable doubt.

4. The State disagrees that Moriarty was entitled to self-defense, and did not acknowledge such at trial. Nevertheless, even if self-defense applied, the State provided sufficient evidence to overcome the defense.
5. There is no evidence the trial court denied Moriarty's self-defense claim, but instead the trial court found any claim of self-defense had been disproven.
6. Without reaching the issue of whether the law of self-defense applies in Washington, Moriarty failed to establish he was entitled to such defense and to the extent he did, the State proved he was not acting in self-defense in his stabbing of Annie Booth.
7. Self-defense was not available in this case and to the extent it was, the State overcame the Defendant's claim.
- 8¹. Self-defense was not available in this case and to the extent it was, the State overcame the Defendant's claim.
9. Self-defense was not available in this case and to the extent it was, the State overcame the Defendant's claim.
10. Self-defense was not available in this case and to the extent it was, the State overcame the Defendant's claim.
11. The State proved Moriarty guilty beyond a reasonable doubt.
12. The State did not commit misconduct and Moriarty failed to brief this issue.
13. The State properly presented its case.
14. Defendant's trial counsel was not ineffective for a perceived failure to raise an objection during the State's closing argument. There is a presumption the trial court will not resolve the case on improper evidence. Moreover, the closing was directly related to the evidence and the defendant's argument.

¹ Appellant 8 is missing from their brief. All numbers in State's brief reflect first the State's assignment of error and issues related thereto and then address Appellants.

15. This case is not subject to cumulative error analysis and Moriarty failed to brief this issue.

III. STATEMENT OF THE CASE

On June 12, 2015 Deputies and Officers responded to an assault with a knife which had occurred in the Beards Hollow area of the beach within Pacific County. RP 9/8/15 38. The victim, Annie Booth, had called 911 and reported Moriarty had tried to grab her dog by the collar and stab the dog in the throat. RP 9/8/15 85, 86, 88. Booth stated she tried to pull Moriarty away from the dog and he tried to stab Booth in the face, but she got her hand up in time to block the face-stabbing and was only struck in the hand, but was bleeding. RP 9/8/15 88, 89, CP 67 at 3 (attached for convenience).

When Deputies arrived, Booth, who was under significant shock from the incident, told the Deputies that Moriarty was on some rocks on the beach when the dog started barking and Moriarty yelled at Booth to get her dog; Moriarty then came off the rocks towards the dog saying that if she didn't get the dog away he was going to kill the dog. RP 9/8/15 41, CP 67 at 2. Moriarty came off the rocks towards the dog, pulled out his knife and started yelling, "get your dog. I'm going to kill your dog." RP 9/8/15 42. The trial court found that Moriarty went towards the dog, saying, "do you want to fucking die"

and that Moriarty continued towards the dog saying he was going to kill the dog. CP 67 at 2.

Booth testified Moriarty had his knife out and was flailing the knife at her dog. PR 9/8/15 77. At this point Moriarty and the dog were approximately 20 feet from Booth and her Jeep. *Id.* Booth observed Moriarty flailing the knife at her dog and moving towards the dog screaming, "Do you want to fucking die," over and over again. RP 9/8/15 79. The dog remained at least three or four feet away from Moriarty. RP 9/8/15 80, CP 67 at 2. With his knife in one hand, and coming towards the dog, Moriarty continued to reach for the dog's collar and Booth was terrified Moriarty was going to cut the dog's throat. *Id.* Booth was yelling at the top of her lungs, "stop, Sugar Bear, stop," "she's not going to bite you," and "please get away from my dog" as she ran towards Moriarty. RP 9/8/15 80, 81. Moriarty continued to come towards the dog swinging the knife and saying "do you want to fucking die." RP 9/8/15 81. The dog continued to stay three to four feet away from Moriarty, but he continued to attempt to come closer and closer to the dog throughout his interaction with the dog. RP 9/8/15 81, 82, 111. CP 67 at 2.

Booth testified that when she reached Moriarty she put her hands on his shoulder and tried to pull him away from the dog. RP

9/8/15 83. Moriarty turned around and looked Booth directly in the eye and tried to stab her in the face. RP 9/8/15 83. Booth was able to get her hand up in time to block the knife from hitting her face and instead the knife stabbed her in the hand. *Id.* Moriarty injured Booth by stabbing her in the hand, causing physical pain and injury. RP 9/8/15 90. Shocked, Booth threw Moriarty to the ground and ran towards her Jeep to call 911. RP 9/8/16 84, 85. CP 67 at 2

Officers were able to locate Moriarty and observed that he had hidden his blue stalking cap in his pocket and had rolled up his blue jacket and stuffed it under his shirt. RP 9/8/15 118. Officers secured Moriarty and searched him incident to arrest, locating a knife with a lanyard attached. The knife was admitted into evidence and identified by the victim as the knife used in this incident. RP 9/8/15 79, 119. The knife had a blade greater than three inches, specifically the blade on the knife was three and a quarter inches from the tip of the blade to the hilt of the blade, and the blade then extends further into the handle—that portion was not included in the measurement of the blade, meaning the blade was even longer as it continued into the handle of the knife. PR 9/8/15 50, 52.

Upon initial questioning by the initial arresting officer, Moriarty said that he had been approached by a brown and white dog and he

displayed the knife to deter the dog. RP 9/8/15 123. Moriarty said Booth then punched him and pushed him all over his body, eventually knocking him off of his feet. *Id.* Moriarty denied stabbing Booth or feeling the need to defend himself from Booth or anyone else. Moriarty was later questioned by Deputy Ray and said that Booth punched Moriarty in the back and then he fell to his knees. RP 9/8/15 137. Moriarty said that is possibly when Booth could have been cut. *Id.*

Moriarty testified at trial that while he was walking on the beach and while stepping off a large rock he observed a dog running fast as a bullet at him with its mouth wide open, its teeth glistening, snarling, barking, and doing anything it can, heading at Moriarty's feet. RP 9/8/15 151, 154. On cross examination Moriarty added that the dog was frothing and being nasty and vicious. RP 9/8/15 177. Moriarty testified that as the dog approached he did not see a vehicle or any person with the dog despite the fact that the vehicle was within 20 feet of him. RP 9/8/15 185. Moriarty testified that in response he pulled out his knife, got down in a low-crouch, with his left arm on his left knee, knife extended in the other hand. PR 9/8/15 155, 165, 176. On cross examination Moriarty confirmed that when the dog approached him, his knife, which was closed, was in his pocket and

he was wearing a jacket that extended below his pants pockets down to his mid-thigh. RP 9/8/15 179.

Moriarty testified the dog would stay 15, 18 inches away from him and out of reach of the knife and that he could never get close to the dog. RP 9/8/15 156, 176, 177. Moriarty testified that he wished he could have come close to the dog so that he could cut the dog in the nose. RP 9/8/15 176. Moriarty testified he did not think he advanced toward the dog, and did not hear the dog's owner call off the dog or try to get the dog away from him. RP 9/8/15 157, 159, 160, 165, 167. However, on cross examination Moriarty testified he made one or two attempts to reach for the dog, but the dog backed away just enough to keep out of the way. RP 9/8/15 177, 178. Moriarty testified that he never said anything to the dog and never said he was going to kill the dog. RP 9/8/15 176.

Moriarty testified that while engaged with the dog Booth showed up and started hitting him on the left side of his back and then on the right side, that the hitting occurred several times on each side and on his back several times, and then she simply disappeared. RP 9/8/15 158, 160. Moriarty testified that Booth then returned at began hitting, smashing Moriarty again and this time grabbed him and threw him forward where he fell to the ground, face

first in the sand causing the knife to stick in the sand. RP 9/8/15 161, 162, 163. Moriarty testified that Booth then mounted him on his back and sat on him for approximately one minute, yet he never feared the assault from Booth. RP 9/8/15 162, 164. On cross examination Moriarty agreed he did not describe to the officers on the scene that Booth had hit him or punched him or had left and come back to assault him further. RP 9/8/15 181, 182. Booth, in rebuttal, denied ever striking Moriarty as he described. RP 9/8/15 189, 194. Booth said she had tried to pull Moriarty away from the dog and her attempted to stab her in the face, describing Moriarty's stabbing motion as coming from his hip with the knife and in a twisting motion swung the knife directly at her face. RP 9/8/15 43, 84.

Park Ranger Benenati, the officer who first made contact with Moriarty immediately after the assault, did not observe any injuries to Moriarty. RP 9/8/15 124. Deputies Ross and Ray observed Moriarty's body the day of the assault and observed no injuries on Moriarty at all, including no red marks or other injury which would be consistent with an assault of Moriarty. RP 9/8/15 55, 56. Deputy Ray specifically had Moriarty remove his shirt and looked over Moriarty's upper torso, front and back, and his arms and did not

observe any injuries, bruising, scrapes, or red marks on Moriarty. RP 9/8/15 133, 138, 202, 204

Moriarty testified that he had no idea what happened to the dog while Booth was on top of him, but the dog was no longer there. RP 9/8/15 164. Booth testified that her dog never did bare her teeth or growl at Moriarty. RP 9/8/15 91. Further, that the dog would never have bite Moriarty or even lunged at him and even after Moriarty assaulted Booth the dog never became aggressive towards Moriarty. RP 9/8/15 91. The dog was never aggressive towards the officers who were on the scene. RP 9/8/15 56. Booth further described her prior occupation in a nursing home and indicated the dog was never aggressive to any of the residence, nor had the dog ever been aggressive to another other person. RP 9/8/15 90, 91, 112.

Moriarty testified he did not do anything to Booth, and did not feel it was necessary to defend himself against Booth because she was just hitting him, and he never attempted to stab Booth. RP 9/8/15 163, 165, 166, 179, 180, 183. Moriarty testified it would have been impossible for his knife to have cut Booth because the knife was stuck in the sand. RP 9/8/15 166, 168. On cross examination Moriarty confirmed that he suggested to the police that Booth stabbed herself. RP 9/8/15 180. Moriarty also asked the deputy if he

had searched Booth's car and purse. RP 9/8/15 200. Booth testified that she did not have a weapon or knife on her on in her vehicle. RP 9/8/15 197.

Days after Moriarty's arrest, and after he had been released from custody, Moriarty went to Cape Disappointment State Park and contacted Park Ranger Benenati and said he wished to apologize for the trouble he had caused and then retold his initial story. RP 9/8/15 124.

The trial court found Mr. Booth's testimony credible and specifically found her version of the events that transpired that day the credible version. CR 67 at 4. Further, the trial court indicated the verdict of the court was "... in large part based upon the defendant's testimony. There's areas of the defendant's testimony that just don't' make sense. So therefore, anyway, the Court is finding the defendant guilty of assault second degree with no aggravating factor." RP9/18/15 231. Consequently, the trial court found Mr. Moriarty's assault of Ms. Booth did not support is claim of self-defense and further noted that Mr. Moriarty did not assert self-defense as to the alleged attack from Ms. Booth, but rather her dog only. CP 67 at 4. Finding no need to defend against the dog, and no self-defense asserted against Ms. Booth based on Moriarty's

testimony, the trial court found Mr. Moriarty did not sustain his burden to establish credible evidence supporting his claim of self-defense. CP 67 at 4. The trial court specifically found that Moriarty was not credible and his testimony was inconsistent with the evidence presented at trial. CP 67 at 4.

At the CrR 3.5 hearing², Moriarty waived jury trial. RP 9/4/15 2, CP 29 (attached for convenience). Trial counsel reported to the trial court that earlier in the week Moriarty and his trial attorney reviewed the written waiver in his office while preparing for trial and Moriarty had a chance to read it “completely.” RP 9/4/15 2, 4. The trial court discussed the waiver with Moriarty and while Moriarty initially had difficulty hearing the court, hearing devices were provided and Moriarty indicated he could hear the court “well,” and “great.” RP 9/4/15 3. The device was even too loud, but even that was corrected, and Moriarty indicate he could hear the court “distinctly.” RP 9/4/15 3.

In discussing the waiver of jury trial the trial court asked Moriarty if he signed the waiver, if he signed of his own free will, and

² Defense asserts the waiver of jury trial was the morning of trial, but the record reflects the Defendant waived jury trial at the CrR 3.5 hearing. Brief of Appellant at p. 14. The CrR 3.5 hearing was conducted on 9/4/15, see RP 9/15, and the trial was 9/8/15, RP 9/8/15.

if he did so only after reviewing it with his attorney; Moriarty agreed he had reviewed the document with his attorney and signed the waiver with his attorney. RP 9/4/15 4. Moriarty agreed that waiving jury trial meant it was a one-way street and he would be stuck having a judge hearing the trial. RP 9/4/15 4-5. The trial court found Moriarty was read or read the waiver, that he signed the waiver in the presence of his attorney and that he made a knowing, intelligent, and voluntary waiver of his right to a jury trial. RP 9/4/15 5. Moriarty's waiver signed on September 4, 2015 memorializes his desire to waive jury trial. CP 29.

Following a conviction for second degree assault³, the trial court ordered 4 months of confinement and authorized, as an alternative, conversion of 30 days of the sentence to be served as community restitution pursuant to RCW 9.94A.680. CP 43 (Judgement and Sentence, attached for convenience). The Court, on its own motion,⁴ which followed notification from the Department of Correction informing the trial court that community restitution was unavailable for Moriarty as a result of a conviction for a violent offense, issued a decision amending the Judgement and Sentence

³ The trial court found Moriarty guilty of second degree assault without the deadly weapon enhancement. RP 9/18/15 231.

⁴ CP 64 asserts the motion was an oral motion of the Plaintiff, but that appears in error.

to reflect a reduction of 30 days, resulting in a 3 month sentence plus 30-days of electronic home monitoring or work release. CP 64.

Moriarty asserts he has been found indigent for this appeal⁵ as well as asserting Moriarty's age⁶ as important facts for this appeal; the State lacks insight into these claims and further indicates they are not relevant for this appeal.

Moriarty and the State timely appeal.

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT AUTHORIZED AN ALTERNATIVE SENTENCE.

The trial court lacked the authority to impose an alternative sentence because Moriarty was convicted of a violent offense. Consequently, the trial court exceeded its authority by converting 30 days of the four-month sentence to community service. Next, the trial court erred by reducing the imposed sentence to three months plus 30 days converted to electronic home monitoring or work release for a total of four months. This sentence is not permitted.

⁵ Appellant's brief at 8; however, Moriarty testified that he was retired. RP 9/8/15 143. This issue should be addressed by the court to ensure Moriarty qualifies for representation at public expense.

⁶ From Appellant's brief, it appears Moriarty's age is unclear to them as well as he is either 77 (brief at 8), 76 (brief at 19), or 75 (brief at 22).

This Court should remand for resentencing directing a sentence of four months without an alternative sentence component.

1. Standard of review.

When a trial court exceeds its sentencing authority under the Sentence Reform Act (SRA) it commits reversible error. *State v. Hale*, 94 Wn.App. 46, 53, 971 P.2d 88 (1999). Whether a trial court exceeded its statutory authority under the SRA is reviewed *de novo*. *State v. Murray*, 118 Wash.App. 518, 521, 77 P.3d 1188 (2003).

2. The trial court lacked the authority to allow for an alternative sentence.

A trial court has no inherent authority and only limited statutory authority to modify a sentence post-judgment. *State v. Shove*, 113 Wash.2d 83, 89, 776 P.2d 132 (1989). In *Shove*, our Supreme Court determined that SRA sentences may be modified only if they meet the statutory requirements relating directly to the modification of sentences. The SRA only allows modification in certain specific and carefully delineated circumstances, specifically earned release time as determined by the DOC, authorized furlough or leave of absence, serious medical issues, clemency or pardon, partial confinement for reestablishment in the community, or reduction in sentence due to prison overpopulation. RCW 9.94A.728. *Shove*, 113 Wash.2d at 86,

776 P.2d 132. The existence of express provisions within the SRA for modifying a sentence precluded the implication of others. *State v. Brown*, 108 Wash. App. 960, 962, 33 P.3d 433 (2001).

While the trial court had the authority to correct an illegal sentence, the trial court had no authority to sentence Moriarty to home detention or work release as an alternative to total confinement. In doing so the trial court imposed an illegal sentence which must be reversed.

RCW 9.94A.680 and RCW 9.94A.734⁷ preclude alternatives to confinement for violent offenders. Moriarty was convicted of second degree assault, a violent offense pursuant to RCW 9.94A.030(55)(vii). Moriarty is therefore precluded from participating in these alternatives to total confinement. The trial court lacked the authority reduce the initial sentence imposed of four months to a sentence of three months plus and alternative sentence. The sentence alternatives are not permitted based on Moriarty's conviction of a violent offense.

Moriarty is further prohibited from participation in work release. RCW 9.94A.030(58) provides: "Work release" means a

⁷ RCW 9.94A.731(3) precludes participation unless the offender is attending work or school at regularly defined hours. Moriarty testified at trial that he was retired. RP 9/8/15 143

program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school. Moriarty testified at trial that he is retired. RP 9/8/15 143.

Thus, Moriarty should be resentenced to a determinative sentence of four months as announced in the trial court's initial pronouncement of sentence.⁸

B. THE TRIAL COURT DID NOT ERROR WHEN IT ACCEPTED MORIARTY'S JURY TRIAL WAIVER.

The trial court properly accepted Moriarty's written waiver of a jury trial⁹ and his verbal request for the court to accept the written waiver, and this Court should not disturb the verdict in this matter.

1. Standard of review.

A jury trial waiver is reviewed *de novo*. *State v. Benitez*, 175 Wash. App. 116, 302 P.3d 877 (2013). The record must adequately establish that the defendant waived his right knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wash. App. 763, 771, 142 P.3d 610 (2006). A written waiver "is strong evidence that the defendant validly waived the jury trial right." *Id.* An attorney's representation that

⁸ The trial court announced the sentence of four months, then discussed a conversion to community service, which was not permitted. RP 10/23/15 252

⁹ CP 29, waiver of jury trial, is attached for this court's convenience

the defendant's waiver is knowing, intelligent, and voluntary is also relevant. *Id.* (citing *State v. Woo Won Choi*, 55 Wash. App. 895, 904, 781 P.2d 505 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990)). Washington law does not require an extensive colloquy on the record; instead “only a personal expression of waiver from the defendant” is required. *Pierce*, 134 Wash. App. at 771, 142 P.3d 610 (citing *State v. Stegall*, 124 Wash.2d 719, 725, 881 P.2d 979 (1994)). As a result, the right to a jury trial is easier to waive than other constitutional rights. *Pierce*, 134 Wash. App. at 772, 142 P.3d 610 (citing *State v. Brand*, 55 Wash. App. 780, 786, 780 P.2d 894 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990)).

2. Moriarty’s waiver was properly received.

Moriarty’s personal expression of a waiver of jury trial is evidenced by his written waiver¹⁰ of jury trial as well as the colloquy between Moriarty, his trial counsel, and the trial court. Moriarty, on appeal, asserts he only had “a chance” to read it completely, but the record demonstrates otherwise. Moriarty reviewed the waiver with counsel as they prepared for trial and he had a chance to read it completely. RP 9/4/15 2, 4. Moriarty’s trial counsel asserted to the

¹⁰ Moriarty agrees he signed and presented to the court the “standard waiver of jury form.” Appellate brief at 13.

court that he “reviewed [the waiver of jury trial] with [his] client . . . earlier in the week.” RP 9/4/15 2. Further, Moriarty had a chance to read it completely. RP 9/4/15 2. We’d ask the court to accept it. PR 9/4/15 2. The court confirmed that Moriarty signed the waiver, of his own free will, and only after reviewing it with his attorney so he knew what he was signing. RP 9/4/15 4. The court further confirmed that Moriarty understood he would be tried before a judge and that it was a one-way-street. RP 9/4/15 4-5. The trial court found Moriarty was read or read the waiver, that he signed the waiver in the presence of his attorney and that he made a knowing, intelligent, and voluntary waiver of his right to a jury trial. RP 9/4/15 5.

Moriarty asserts on appeal— without citation, declaration, or evidence— that all he had was “a chance” to contemplate the waiver of jury trial rather than “actually reading and understanding the waiver or form.” And that his trial counsel never assure the court that Moriarty had more than “a chance” to read the documents. Appellant brief at 13. However, that is not what the record demonstrates. Moriarty’s trial attorney assured the court that he reviewed the document with Moriarty in his office earlier in the week while preparing for trial. RP 9/4/15 2. Further, that Moriarty read the waiver “completely.” RP 9/4/15 2. The trial court confirmed that Moriarty

reviewed the waiver completely with his attorney before he signed the waiver. RP 9/4/15 4. All of this was well after the court confirmed that Moriarty could hear the court “great” and “distinctly.” RP 9/4/15 3.

Moriarty asserts that the court was not satisfied that Moriarty understood what he was doing and that the court did not ask Moriarty whether he wanted to proceed without a jury. Appellant’s brief at 14. However, appellant seems to take liberty with the record. The record reflects that the trial court ensured Moriarty could fully hear and participate in the colloquy with the court and that Moriarty had fully reviewed the waiver and understood the trial would be to the bench rather than the jury, and, finally, that he wanted a judge to hear the trial:

THE COURT: Your hearing better than you heard without those devices. Is that accurate?

THE DEFENDANT: Absolutely.

...

The Court is consenting to hear this case. Once this is signed, sir, you should figure that you’re stuck with me or a judge if I’m sick or something. Mr. Hatch will explain all that. But for all practical purposes this is a one-way street. You sign it and I sign it and you’re stuck with it. Is that crystal clear?

THE DEFENDANT: It is.

THE COURT: Okay. Very well. Thank you. The Court finds the foregoing statement was read by or to

the defendant, signed by the defendant present with his lawyer. The Court finds that the defendant knowingly, intelligently, voluntarily waives his right to a jury trial. The Court does consent to the defendant's waiver of jury trial. The Court is satisfied that those conditions were fulfilled.

RP 9/4/15 5.

Moriarty's waiver along with the colloquy between trial counsel, the court, and Moriarty demonstrate an expression to waive jury trial. The verdict should not be disturbed as there is ample evidence in support of Moriarty's knowing, intelligent, and voluntary waiver of a jury trial.

C. SELF-DEFENSE

Moriarty asserts, without support, that the trial court refused to apply the law of self-defense to the facts of his case, and that the trial court failed to consider self-defense. Appellant's brief at 15. However, evidence presented at trial establishes that Moriarty was the aggressor and thus, self-defense was not an available defense. Further, even if self-defense was available, the state overcame its burden as evidenced by the trial court's finding of fact that the trial court did not find Moriarty's testimony credible and convicted Moriarty of second degree assault. CP 67 at 4.

1. Standard of review.

To determine whether a defendant is entitled to an instruction on self-defense or entitled to have a judge consider it in a bench trial, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. *State v. Read*, 147 Wash.2d 238, 242, 53 P.3d 26 (2002), citing *State v. Walker*, 136 Wash.2d 767, 772, 966 P.2d 883 (1998). Accordingly, when assessing a self-defense claim, the trial court applies both a subjective and objective test. *Id.*

When subjectively assessing a defendant's self-defense claim, the trial court must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred. *Id.* When objectively assessing a defendant's claim, the trial court must determine what a reasonable person would have done if placed in the defendant's situation. *Id.* Considering both the subjective and objective inquiries, the trial court must determine whether the defendant produced any evidence to support the claim he or she subjectively believed in good faith he or she was in imminent danger of great bodily harm and whether this belief, viewed objectively, was reasonable. *Id.*

If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is *de novo*. Walker, 136 Wash.2d at 771-72, 966 P.2d 883.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *State v. Vickers*, 148 Wash.2d 91, 116, 59 P.3d 58 (2002). The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *Id.* citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wash.2d 935, 939-40, 845 P.2d 1331 (1993). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.*, citing *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999). In the absence of evidence to the contrary, the presumption is the judge in a bench trial does not consider inadmissible evidence in rendering a verdict. *Read*, 147 Wash.2d at 242.

2. Moriarty failed to establish self-defense

Here, the trial court found Moriarty was not in fear of immediate attack from the dog, but instead that Moriarty's apparent fear was based on an experience he'd had with a dog that had bitten him in the leg more than 20 years ago in a foreign country. CP 67, finding of fact 1.7. However, the trial court further found Moriarty was not credible. CP 67. Additionally, the trial court found Moriarty was "... climbing down off the rocks towards [Booth's] dog¹¹." CP 67. This finding is supported by the record: "Moriarty then came off the rocks towards the dog saying that if she didn't get the dog away he was going to kill the dog." RP 9/8/15 41. "Moriarty opened the knife and went towards Ms. Booth's dog, saying 'do you want to fucking die.'" CP 67, finding of fact 1.3. Moriarty then came off the rocks towards the dog saying that if she didn't get the dog away he was going to kill the dog. RP 9/8/15 41. Moriarty came off the rocks towards the dog, pulled out his knife and started yelling, "get your dog. I'm going to kill your dog." RP 9/8/15 42. The trial court found that Moriarty went

¹¹ Moriarty asserts the trial court's finding of fact 3 is unsupported by the record and that because Booth could not see Moriarty climbing off the rocks she could not see her dog run towards Moriarty. Appellant brief at 20. However, the record demonstrates Booth observed Moriarty climb off the rocks towards her dog. RP 9/8/15 41. Moreover, Booth was a mere 20 feet away from Moriarty on the beach. PR 9/8/15 77.

towards the dog, saying, "do you want to fucking die" and that Moriarty continued towards the dog saying he was going to kill the dog. Moriarty had his knife out and was flailing the knife at her dog. PR 9/8/15 77. Moriarty was flailing the knife at Booth's dog and moving towards the dog screaming, "Do you want to fucking die," over and over again. RP 9/8/15 79. The dog remained at least three or four feet away from Moriarty. RP 9/8/15 80, CP 67 at 2. With his knife in one hand, and coming towards the dog, Moriarty continued to reach for the dog's collar and Booth was terrified Moriarty was going to cut the dog's throat. *Id.* Consequently, the findings of fact are supported by substantial evidence.

With the verdict and the trial court's finding that Moriarty's testimony was not credible, it is clear the trial court found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact. Consequently, the standard of review is abuse of discretion.

A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). A court's decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct

standard. *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* The “untenable grounds” basis applies “if the factual findings are unsupported by the record.” *Id.*

Here, the court's reasoning is supported by the record. Moriarty came down off of the rocks, a place of safety, towards a dog that was staying three to four feet away from him with an owner, twenty feet away, yelling the dog was friendly and would not bite. While Moriarty may have had an experience with a dog twenty years ago in a foreign country, that, alone, was insufficient. In light of the trial court's ruling that Moriarty was not credible, the balance of his testimony should not be consider on review. Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wash.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wash.2d 380, 208 P.3d 1107 (2009). An appellate courts defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

The record would, then, support a finding on review that the trial court did not abuse its discretion in denying the defendant's assertion of self-defense.

However, in the event this Court feels the trial court's lack of a specific statement within the findings of fact and conclusions of law reflects the trial court's refusal to consider self-defense because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, then the standard of review is *de novo*.

A *de novo* review would, likewise, reach the same conclusion. Moriarty was not entitled to a self-defense instruction, and to the extent he was, the state would be entitled to an aggressor instruction. Further the State would have overcome the defense.

No reasonable person in the defendant's shoes would have acted as the defendant acted. No person would climb down from the rocks, a place of relative safety, in order to get closer to what Moriarty described as a snarling, growling, frothing, glistening-toothed Pitbull only to "prick" it in his nose in the hopes it would leave. No person would have placed their face so close to danger. Further, no person would fear, as Moriarty agreed, the dog's owner.

“[T]he right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999); see also *State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005). A trial court does not err by giving a first aggressor instruction where “there is conflicting evidence as to whether the defendant's conduct precipitated a fight.” *Riley*, 137 Wn.2d at 910. In determining whether there was sufficient evidence presented to support giving this instruction, appellate courts view the evidence in the light most favorable to the State, the party that requested the instruction. *State v. Fernandez–Medina*, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000).

Here, Moriarty was the aggressor. He is the person who pulled out a knife to attack an animal. He asserts here, as he did in trial, that the dog provoked his attack and caused him to have to defend himself¹². However, his attack was against Booth, not the dog¹³.

¹² Moriarty misstates the facts in *State v. Hoeldt*, 139 Wn. App. 225, 160 P.3d 55 (2007). Hoeldt, who sought by police for an outstanding warrant, was holding a pit bull by the collar as police attempted to arrest him. The dog was barking and growling and Hoeldt motion with this arm, apparently towards the police, and the dog charged the officers. The dog lunged at the officer's throat and chest and the officer was required to shoot the dog. The court determined the manner in which the dog was used caused the dog to qualify as deadly weapon (much like a pencil). Consequently, there are not “facts similar to the instant case,” as asserted in Appellant's brief at 16.

¹³ Moriarty's reliance on *State v. Burk*, 114 Wash. 370, 195 P. 16, 21 A.L.R. 193 (1921)—which is incorrectly cited in his brief—is misplaced. The Burk court considered the testimony presented and also noted that “circumstances might arise where the court might be justified in holding, as a matter of law, that the testimony failed to show such

To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; and (3) the defendant exercised no greater force than was reasonably necessary. *State v. Callahan*, 87 Wash. App. 925, 929, 943 P.2d 676 (1997).

Assuming, *arguendo*, that Moriarty's fear of the dog was sufficient to establish imminent danger of death or great bodily harm, the fear was not objectively reasonable as to Booth, the victim of Moriarty's assault. Booth merely pulled him away from her dog. Moriarty responded by looking Booth in the face, and with a twisting-thrusting motion, attempted to stab her in the face. RP 9/8/15 83. Finally, this force was significantly greater than reasonably necessary. As a result, Moriarty's argument fails.

Finally, Moriarty's claim arises out of the state's closing arguments without objection at the trial court. RP 9/8/15 207-210. Consequently this error should not be considered on appeal unless an exception exists. RAP 2.5(a)(3). The appellant must demonstrate

reasonable necessity," which is certainly be the case under modern law. Moriarty further asserts Booth was not entitled to protect her property (the dog). Appellant's brief at 21. The State disagrees in light of Moriarty's initiation of the altercation. RCW 9A.16.020(3).

both that the purported error is of constitutional magnitude and that the error is “manifest.” *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A “manifest” error is one that is “so obvious on the record that the error warrants appellate review.” *State v. O’Hara*, 167 Wn.2d 91, 99–100, 217 P.3d 756 (2009). Appellant must “show how the alleged error actually affected the [appellant]’s rights at trial.” *O’Hara*, 167 Wn.2d at 98 (alternation in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). Accordingly, a constitutional error is manifest only where the appellant can show “actual prejudice”—the appellant must make a “plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. *State v. Eaker*, 113 Wash.App. 111, 120, 53 P.3d 37 (2002). It is the State’s burden to prove the error was harmless beyond a reasonable doubt. *Id.* Applied to an element omitted from, or misstated in, a jury instruction, the error was harmless if that element is supported by uncontroverted evidence.” *Id.*

Here, the uncontroverted evidence is that Moriarty did not fear assault from Booth, yet attempted to stab her in the face. The trial court, sitting as the fact finder, concluded that Moriarty's self-defense claim failed and that he, in fact, committed second degree assault. Because this was a bench trial, and Moriarty has failed to overcome the presumption that the court will properly evaluate the evidence, he has failed to establish an error of constitutional magnitude. Moreover, in light of the uncontroverted evidence, which is supported by substantial evidence from the record, any error by the court not including its analysis related to the denial of Moriarty's self-defense claim is harmless beyond a reasonable doubt.

Moriarty's assertion that the trial court did not consider his evidence is unsupported and the verdict should not be disturbed.

D. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT¹⁴ IN CLOSING ARGUMENT.¹⁵

Moriarty asserts the state committed prosecutorial misconduct during closing. The remarks made in closing argument were neither improper nor prejudicial. Moreover, they

¹⁴ The State urges this be more correctly referenced as prosecutorial error, as "prosecutorial misconduct" should be reserved for conduct intended to violate the Constitution or for violations of specific ethical requirements.

¹⁵ Appellant asserts the misconduct was committed by the deputy prosecutor. The elected Prosecutor tried this case and also responded to this appeal. While this is immaterial to the issue, I wanted to make certain the record is clear.

drew no objection from the defense during closing argument. RP
9/8/15 206-222.

1. Standard of review.

The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wash.2d 727, 202 P.3d 937 (2009), citing *State v. Gregory*, 158 Wash.2d 759, 858, 147 P.3d 1201 (2006). Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” incurable by a jury instruction. *Id.*, citing *Gregory*, 158 Wash.2d at 841, 147 P.3d 1201 (quoting *State v. Stenson*, 132 Wash.2d 668, 719, 940 P.2d 1239 (1997)). In the context of closing arguments, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *Id.* at 860, 147 P.3d 1201 (citing *State v. Gentry*, 125 Wash.2d 570, 641, 888 P.2d 1105 (1995)). If defense counsel failed to request a curative instruction, the court is not required to reverse. *Fisher*, 165 Wash.2d at 747, citing *State v. Russell*, 125 Wash.2d 24, 85, 87, 882 P.2d 747 (1994)(it is not misconduct to argue that the evidence does not support the defense theory). While a Defendant

is not required to testify, if the defendant chooses to testify, that testimony is not immunized from attack by the prosecution. *State v. Vassar*, 188 Wn. App. 251, 260, 352 P.3d 856 (2015). “On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

To prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record and all the trial circumstances, the prosecutor’s conduct was improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice, a defendant must show a substantial likelihood that the misconduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442–43. Appellate courts consider the prosecutor’s alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument. *State v. Anderson*, 153 Wn.App. 417, 430, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Where improper argument is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect. *State v. Swanson*, 181 Wash. App. 953, 964, 327 P.3d 67 (2014), citing *Gentry*, 125 Wash.2d at 596.

The presumption on appeal is that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings and will not consider evidence for an improper purpose. *State v. Miles*, 77 Wash.2d 593, 601, 464 P.2d 723 (1970); see also *State v. Adams*, 91 Wash.2d 86, 93, 586 P.2d 1168 (1978); *State v. Bell*, 59 Wash.2d 338, 360, 363–64, 368 P.2d 177, *cert. denied*, 371 U.S. 818, 83 S.Ct. 34, 9 L.Ed.2d 59 (1962); *State v. Ryan*, 48 Wash.2d 304, 293 P.2d 399 (1956)

2. Prosecutorial misconduct was not committed.

Moriarty asserts the State committed prosecutorial misconduct in closing argument by misstating the law on self-defense¹⁶, by stating personal opinion as to the merits of the evidence, and making a personal plea to the court to convict Moriarty. Appellant's Brief at P. 5. Because these statements are required to be evaluated in their totality and in the context of all of the evidence, the State provides context to the statements which were truncated in Appellant's brief:

Mr. Moriarty is asserting some type of self-defense here, but I don't think that he's demonstrated a need to defend himself. I don't think that there's evidence that he had the need to defend himself. And even if there was, I believe the State has overcome the burden that

¹⁶ Moriarty also asserts, without citation, that the State conceded a misstatement of the self-defense standard. Brief of Appellant at page 23. The State made no such concession at trial and does not here.

he established some sort of self-defense or that he had some necessity to defend himself. He describes the dog never coming to him. He describes the dog never getting within more than arm's reach. None of that would necessitate self-defense. More importantly, I think Ms. Booth was entitled to protect her property, in particular the dog. I think the ample testimony here is that in fact on that date, Mr. Moriarty when he was confronted, Judge, I think the evidence should show that he was angry. I think he's minimized here on the stand, and I think the Court can see that. I think he was basically angry that he was being disturbed by an animal and he decided he was going to come off that rock and he was going to kill that dog. I think that what the evidence has shown in that when he got down off that rock and he got to that sand that he simply made a decision that he was going to cut that dog. And I think when he did that, he probably did not pay attention to the other folks around him. But that doesn't diminish the fact that when Ms. Booth pulled him off of that dog, he turned around and he looked at her and he stated at her, and that's when he took that knife and tried to stab her in the face. But I think this court can gauge the testimony as it hear it from the witnesses. Gauge the credibility of it, the manner in which they testified. And I think the evidence shows that she in fact was stabbed that day by Mr. Moriarty, that he did so with the intent to inflict great bodily harm. I don't think you stab someone in the face or attempt to stab someone in the face without intent. She testified very clearly that he turned around and looked at her and from about her waist—his waist, rather, took that knife with a twisting motion and a stabbing motion and went right at her face. She was able to get her hand up in time to block it, and that caused the injury.

RP 9/8/15 207-08. Moriarty made no objection to the States closing argument and asserts, without citation or argument¹⁷, that the failure to object constituted ineffective assistance of counsel.

Moriarty takes further issue with statements which begin with “I think,” yet a full review of the record demonstrates the sentences continue with “the evidence shows,” or a specific statement about the evidence directly. RP 9/8/15 208-09. In context, the statements draw the trial court to certain evidence and its relationship to the case. The closing argument was not improper and the Defense was not ineffective for a failure to object.

To demonstrate ineffective assistance of counsel, Moriarty must show that his counsel’s conduct was deficient and that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn. 2d 126, 130, 101 P.3d 80 (2004). To show prejudice, Moriarty must show a reasonable probability that, but for counsel’s purportedly deficient performance, the outcome of the trial would have differed. *Id.* at 130. If Moriarty fails to establish either prong of the ineffective assistance of counsel test the appellate court need not examine the other prong. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

¹⁷ Appellate brief at 3, issues pertaining to error, number 14.

Moriarty next takes issues with the statement, “[Moriarty’s] testimony, frankly, Judge, does not appear to be credible to me. It appears that he is trying to tell a story. Even the idea that this woman cut herself, that the officers need to go find a knife from her, that just doesn’t fit with the evidence. That doesn’t fit with the testimony from the officers, what they observed. And that 911 call, you know, that this happened right then. Your Honor, I think that’s pretty telling of what really happened, cause [sic] that’s right immediately after this thing happened.” RP 9/8/15 210

Moriarty asserts, without analysis or citation to authority, that these comments undermine and dilute the presumption of innocence by inserting personal opinion into closing argument thereby urging the court to convict on something other than a reasoned and dispassionate view of the evidence. Appellant’s brief at 26-27. A prosecutor is permitted to invite the jury to review the evidence and determine whether there was corroborating evidence to support a self-defense claim. *State v. Munguia*, 107 Wash.App. 328, 26 P.3d 1017 (2001). A prosecutor may also comment on the lack of evidence, since it is the defendant’s burden of producing evidence to support the elements of self-defense. *Id.* citing *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).

Moriarty further asserts that closing remarks in rebutting defense's closing were improper. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *State v. Gauthier*, 189 Wash. App. 30, 354 P.3d 900 (2015), citing *State v. Brown*, 132 Wash.2d 529, 566, 940 P.2d 546 (1997). Even where the comments are improper, the remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wash.2d at 86, 882 P.2d 747.

Moriarty next assigns error to the State's presentation of their case, indicating the State did not "assert any serious response" to Moriarty's self-defense claim, characterizing this as "extreme minimization" affecting the court's ultimate decision. Appellate brief at 28. It should be noted that Moriarty provides no legal authority or analysis for this position and on review this should not be considered. Certainly the State cannot be made to challenge every defense theory which, in its view, failed to carry the day.

Finally, Moriarty asserts the State's "egregiously misstated the law on self-defense first by misstating the facts in a manner wildly

inconsistent to the testimony and then using that twisted version to convolute the law of self-defense to relieve the State of any burden to disprove that defense.” Appellant’s brief at 27.

In this case the evidence demonstrated that Moriarty’s was standing on a large section of rock well above the sand when he observed the dog and went towards the dog, knife extended and attempted to kill the dog. RP 9/8/15 85-86, 88, 89, 91, 108, 111, Trial Court’s Finding of Fact 1.1 (to which Moriarty assigns error). Despite the fact that the dog never came within several feet of Moriarty and was never aggressive, Moriarty continued coming towards the dog throughout the entire incident, attempting to grab the dog’s collar and cut the dog’s throat. RP 9/8/15 91, 111. Finally, Moriarty’s testimony, in light of common experience, is patently unreasonable. No one puts their face and hands near a dog they believe it trying to attack them. For those reasons there was no need to act in self-defense and even if there were, it was Moriarty’s actions which necessitated the need to defend himself. Even if there was need to defend against the dog, nothing demonstrates a need to defend himself against the victim, Annie Booth. In fact Moriarty’s testimony demonstrates he had no fear of Booth or need to defend himself against Booth. RP 9/8/15 165.

For the foregoing reasons, and without conceding error, Moriarty failed to timely objection, which waives any error, and Moriarty has failed to establish error by his attorney, or prejudice from any argument made by the State. Moreover, with the matter being tried to the bench, the Appellant has failed to overcome the presumption on appeal is that the trial judge, knowing the applicable rules of evidence, relied on inadmissible evidence when making his findings or considered evidence for an improper purpose. There is no error in this verdict and it should not be disturbed.

E. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY EVIDENCE AND THE FACTS SUPPORT THE CONCLUSIONS OF LAW.

1. Standard of review.

Following a bench trial appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Homan*, 181 Wash. 2d 102, 105-106, 330 P.3d 182 (2014), citing *State v. Stevenson*, 128 Wash.App. 179, 193, 114 P.3d 699 (2005). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.* Unchallenged findings of facts and findings of fact supported by substantial evidence as verities on appeal. *Homan*, 181 Wash.2d at

106, citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 169, 795 P.2d 1143 (1990).

Challenges to a trial court's conclusions of law are reviewed *de novo*. *Homan* 181 Wash. 2d at 106, citing *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

2. Trial court's findings are supported by substantial evidence.

While the Appellant amplifies in his brief facts he asserted at trial as the true facts of the case, the trial court found Moriarty's testimony not credible. CP 67. Issues of credibility are left to the trier of fact. Therefore, the facts outlined above, should be favored over Moriarty's self-serving and previously rejected facts.

The findings of fact are supported by substantial evidence and demonstrate that Moriarty attempted to stab Booth in the face with a knife. As demonstrated above, Moriarty climbed off a rock, attempted to kill Booth's dog and when she pulled him away, he looked at her directly in the face and attempted to stab her in the face, ultimately striking her in the hand causing an injury. The injury was observed by the officers. Moriarty testified that he was the victim of an assault and that Booth had fabricated her injury. However, officers found no injury whatsoever on Moriarty. Not even a red mark

despite the pummeling he asserted he had taken from her. These facts are supported by the record and demonstrate that the trial court's findings of fact in CP 67 justify the conclusions of law drawn from them.

F. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN MORIARTY'S CONVICTION FOR SECOND DEGREE ASSAULT.

1. Standard of review.

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *Homan*, 181 Wash.2d at 106, citing *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992); *State v. Drum*, 168 Wash.2d 23, 35, 225 P.3d 237 (2010). These inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*, citing *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068; accord *State v. Kilburn*, 151 Wash.2d 36, 57–58, 84 P.3d 1215 (2004). Further, appellate courts defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *Homan* 181 Wash.2d at 106, citing *State v. Jackson*, 129 Wash. App. 95, 109, 117 P.3d 1182 (2005).

2. Evidence was sufficient to convict.

In admitting the truth of the facts and inferences drawn from them, sufficient evidence establishes that Moriarty attempted to stab Booth in the face with a knife contrary to RCW 9A.36.021.

A person commits second degree assault when they intentional assault another with a deadly weapon. A deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. A knife with a blade longer than three inches is a deadly weapon per se. RCW 9.94A.825.

Here, Moriarty used a knife with a blade greater than three inches. RP 9/8/15 63. Moriarty turned around, looked at Booth “dead in the eye and he tried to stab [her] in the face.” RP 9/8/15 83. Moriarty stabbed booth with a thrusting, twisting motion which started at his waist and was directed at Booth’s face. PR 9/8/15 84. Booth was able to get her hand up in time resulting in Moriarty only being able to stab her in the hand, which was in front of her face, causing an injury to Booth’s hand. *Id.*

Based on the foregoing, there is sufficient evidence to prove beyond a reasonable doubt that Moriarty intentionally assaulted Booth with a deadly weapon and the verdict should not be disturbed.

G. INEFFECTIVE ASSISTANCE OF COUNSEL¹⁸

1. Standard of review.

A claim of ineffective assistance of counsel presents a mixed question of fact and law which is reviewed *de novo*. *State v. Sutherby*, 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

2. Defendant's trial counsel was not ineffective.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334, 899 P.2d 1251 (1995), citing *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d

¹⁸ Moriarty makes this assignment of error, yet fails to brief this issue as required by RAP 10.3(6). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma*, 90 Wash. App. 533, 954 P.2d 290 (1998), citing *State v. Johnson*, 119 Wash.2d 167, 171, 829 P.2d 1082 (1992). Without argument or authority to support it, an appellant waives an assignment of error. *Smith v. King*, 106 Wash.2d 443, 451–52, 722 P.2d 796 (1986). Appellate courts need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *State v. Dennison*, 115 Wash.2d 609, 629, 801 P.2d 193 (1990).

816 (1987) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

There is a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. In assessing counsel's performance, a reviewing court "must make every effort to eliminate the distorting effect of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *State v. Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1982). Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). A claim of ineffective assistance of counsel cannot be sustained without demonstration of actual prejudice. *McFarland*, 127 Wash.2d at 334.

Here, Moriarty has failed to provide any analysis or outline how trial counsel was deficient, let alone how counsel's representation resulted in prejudice to the presentation of his case. Consequently, Moriarty cannot sustain his burden.

V. CONCLUSION

The trial court lacked the authority to impose an alternative sentence in this matter because Moriarty was convicted of a violent offense. Consequently, he must serve the sentence imposed in total confinement.

The trial court rejected Moriarty's self-defense claim and instead found him, appropriately, guilty of second degree assault. The trial court outlined its findings of fact and conclusions of law, which were supported by the record, and demonstrated that Moriarty intentionally assaulted Booth with a deadly weapon. Moriarty did not act in self-defense and the record supports that conclusion. Moriarty's trial counsel was not ineffective for want of objections to the Prosecutor's proper argument in closing, and, thus, the verdict should not be disturbed on appeal.

RESPECTFULLY submitted this 19th day of June, 2016.

A handwritten signature in black ink, appearing to read 'M. McClain', is written over a horizontal line.

MARK MCCLAIN, WSBA 30909
Pacific County Prosecutor
Attorney for Plaintiff

Appendix A
WAIVER OF JURY TRIAL

FILED

2015 SEP -4 PM 4:47

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY [Signature] DEPUTY



SUPERIOR COURT OF WASHINGTON
COUNTY OF PACIFIC

State of Washington,

Plaintiff,

NO. 15-1-00079-7

vs.

MICHAEL MORIANTY

Defendant(s)

WAIVER OF JURY TRIAL

The undersigned defendant states that:

1. I have been informed and fully understand that I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is alleged to have been committed;
2. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the court;
3. I freely and voluntarily give up my right to be tried by a jury and request trial by the court.

Dated: 9-4-2015

[Signature]
Defendant
MICHAEL J. MORIANTY

[Signature] #21310
Defendant's Lawyer
DAVID S. HATCH

JUDGE'S CERTIFICATE

The foregoing statement was read by or to the defendant and signed by the defendant in the presence of his lawyer. The court finds that defendant knowingly, voluntarily and intelligently waived his right to a jury trial. The court does ~~(not)~~ consent to defendant's waiver of a jury trial.

Dated: 9/4/15

[Signature]
Judge

Appendix B

FINDINGS OF FACT CONCLUSIONS OF LAW

FILED

2015 DEC 18 AM 8:11

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY jb DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL J. MORIARTY,

Defendant.

NO. 15-1-00079-7

FINDINGS OF FACT
CONCLUSIONS OF LAW

On September 8, 2015, a Bench Trial was held before the Court. The Defendant was present, with his attorney, David Hatch. The State was represented by Prosecuting Attorney Mark McClain. The Court heard testimony from the State's witness; Annie Booth, Pacific County Deputy Sheriff Steve Ross, Pacific County Deputy Sheriff Michael Ray, Long Beach Police Officer Casey Meling, and Washington State Park Ranger Thomas Benenati. The Court considered exhibits admitted into evidence. The Court heard testimony from the Defendant. The Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

- 1.1 On June 12, 2015, Annie Booth went to Beards Hollow, which is in the Cape Disappointment State Park in the Long Beach, Washington area on the beach, to let her dog out for a walk. Also, on June 12, 2015, Michael Moriarty, a 76 year old male, went to Beard's Hollow to get exercise to regain his breathing capacity which had been diminished from his bypass surgery in 2014.

FINDINGS OF FACT
CONCLUSIONS OF LAW

- 1.2 Mr. Moriarty had walked to the lower Beard's Hollow parking lot, then out to the beach, and around a rock outcropping. On his return path back to his vehicle, he took a shortcut over a low part of the rock outcropping along a path that dropped him down to a patch of soft sand. From that point, Mr. Moriarty was backtracking on his original route up a fairly steep hill to return to his vehicle.
- 1.3 Ms. Booth had let her dog out of her Jeep. As she was getting things out of the vehicle, she heard her dog barking. Ms. Booth looked up to see an older male, later identified as the defendant, Michael Moriarty, climbing down off the rocks towards her dog. As Mr. Moriarty came off the rocks into the soft sand, her 55 pound stinky dog came towards him barking and with his teeth bared. The dog was not on a leash. Mr. Moriarty was wearing a rain coat, knit hat, and long pants. Mr. Moriarty retrieved a folding knife from his pocket. The knife was attached to a lanyard which was further attached to his pants with a metal clasp. Mr. Moriarty opened the knife and went towards Ms. Booth's dog, saying "do you want to fucking die?"
- 1.4 Mr. Moriarty opened up a knife and started swinging it towards Ms. Booth's dog, while yelling at the dog that he was going to kill the (unleashed) dog.
- 1.5 Mr. Moriarty testified that he never reached for the dog and only crouched lower in order to "prick" the dog on the nose. He testified that he did not reach for the dog. The dog honored the knife and stayed approximately one foot away from the knife and continued to bark and snarl.
- 1.6 Ms. Booth began towards Mr. Moriarty, yelling at him that he was making it worse. Mr. Moriarty was attempting to grab the dog's collar, trying to knife the dog in the neck, and the dog was staying an arms-length away from Mr. Moriarty. Ms. Booth was emotionally distraught indicating concern for her dog's safety. The dog was barking and snarling at Mr. Moriarty during this encounter.
- 1.7 Mr. Moriarty agreed that the dog was not approaching him, but he feared the dog may give him rabies given an experience he'd had with a dog that had bitten him in the leg more than 20 years ago in a foreign country.
- 1.8 Ms. Booth ran towards Mr. Moriarty and once she reached him, she grabbed Mr. Moriarty's shoulder and pulled him away from the dog.
- 1.9 Mr. Moriarty looked directly at Ms. Booth and attempted to stab her in the face with a thrusting and twisting motion, but Ms. Booth was able to put her hand up in time to stop the knife from hitting her face. The knife struck Ms. Booth's hand causing injury to her hand which took a stitch to repair.
- 1.10 Ms. Booth pushed Mr. Moriarty to the ground, picked up her dog, and hastened to her Jeep to call 911 for help.

- 1.11 Ms. Booth called 911 and, frantically, reported: "I've been stabbed at the beach by an elderly man in the hand. I'm at Beards Hollow and he is walking away from me. He is wearing a blue windbreaker, and a blue, blue, navy blue cap. I'm bleeding. He tried to stab my dog, and I went to stop him, because he was trying to stab my dog. He stabbed me in the hand. He is running away. You need to catch him."
- 1.12 Ms. Booth's fear was evident from the call and she described her injury and the assault in detail. It was evident that Ms. Booth was under the stress of the event and was describing the startling event which had just occurred to her.
- 1.13 Officer Meling and Ranger Benenati located Mr. Moriarty and secured the knife from his pocket.
- 1.14 Mr. Moriarty indicated to the Officers on the day of his arrest that he encountered a brown and white dog on the beach and the dog snarled and bared its teeth at him. Mr. Moriarty asserted that he displayed the knife to protect himself from the dog. Mr. Moriarty said a short, stocky woman arrived and punched and pushed him all over his body, eventually knocking him off his feet.
- 1.15 Mr. Moriarty testified at trial that the woman began striking him all over his body, then retreated without gathering her dog, and then again began assaulting the defendant eventually knocking him to the ground before leaving.
- 1.16 Mr. Moriarty asserted that Ms. Booth never attempted to retrieve her dog, but instead began intentionally assaulting him. Mr. Moriarty asserted that he was never in fear of assault or injury from Ms. Booth.
- 1.17 Mr. Moriarty then walked back to his vehicle, which was more than a half of a mile away, where he encountered law enforcement officers.
- 1.18 Officer Meling located Mr. Moriarty and found that he had hidden his coat in the small of his back under an outer shirt and also placed his cap in his pocket. Mr. Moriarty testified he did not do this in order to hide his appearance, but instead because he was hot.
- 1.19 Deputies Ray and Ross transported Mr. Moriarty for booking, and during that process, had Mr. Moriarty remove his clothing so they could inspect his body. Neither deputy observed any red marks or injuries to Mr. Moriarty.
- 1.20 Mr. Moriarty asserted that in no way did he cut the victim with his knife, but instead that the knife was kept low and away, so as to "prick" the dog's nose, and never contacted Ms. Booth with the knife in any way. Mr. Moriarty stated that the knife was thrust into the sand when Ms. Booth assaulted him.

- 1.21 The Court carefully observed the manner and demeanor of all witnesses together with all admitted evidence.
- 1.22 The Court finds, after such observation of the witnesses, especially of Mr. Moriarty and Annie Booth, that Ms. Booth's version of the events is the credible version.

II. CONCLUSIONS OF LAW

Based on these findings, the Court hereby enters the following Conclusions of Law:

1. The Court has jurisdiction over Mr. Moriarty and the subject matter of this action.
2. Mr. Moriarty is not guilty of Assault in the First Degree.
3. Mr. Moriarty is guilty of the crime of Assault in the Second Degree.
4. Mr. Moriarty was not armed with a deadly weapon for the purposes for the special allegation for a deadly weapon enhancement.
5. Mr. Moriarty did not claim self-defense from Annie Booth, only that he was defending himself against her dog. Therefore, there is no self-defense claim to consider as to the assault upon Annie Booth.

Decided: December 18, 2015


JUDGE MICHAEL SULLIVAN

Appendix C

JUDGMENT AND SENTENCE

FILED

2015 OCT 23 PM 5:22

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

By Jo DEPUTY

**Superior Court of Washington
County of PACIFIC**

State of Washington, Plaintiff,

vs.

MICHAEL J. MORIARTY 03/29/1939
Defendant. DOB
PCN:
SID: WA28044714

No. 15-1-00079-7

Felony Judgment and Sentence --

Jail One Year or Less

(FJS)

☒ Clerk's Action Required, 2.1, 4.1, 4.3, 5.2, 5.3,
5.5, 5.7

☐ Defendant Used Motor Vehicle

☐ Juvenile Decline ☐ Mandatory ☐ Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon

☐ guilty plea (date) __ ☐ jury-verdict (date) _____ ☒ bench trial (date) 9/8/15 _____:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	ASSAULT IN THE SECOND DEGREE	9A.36.021(1)(c)	B	6/15/15

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

☐ For the crime(s) charged in Count _____, domestic violence was pled and proved.
RCW 10.99.020.

☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825,
RCW 9.94A.533.

☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____.
_____. RCW 9.94A.825, 9.94A.533.

Felony Judgment and Sentence (FJS) (Jail One Year or Less)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (10/2013))

Page 1 of 12

- ☐ In count _____ the defendant committed a robbery of a pharmacy as defined in RCW 18.64.011(21), RCW 9.94A. ____
- ☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- ☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang member** or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.829.
- ☒ ~~The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.~~
- ☐ In Count _____, the defendant had (number of) _____ **passenger(s) under the age of 16** in the vehicle. RCW 9.94A.533.
- ☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- ❖ If checked, complete section 5.7 below.
- ☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- ☐ **Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):**

	Crime	Cause Number	Court (County & State)	DV* Yes
1.				
2.				

* DV: Domestic Violence was pled and proved.

- ☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History:

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1	NONE						
2							
3							
4							
5							

* DV: Domestic Violence was pled and proved.

- ☐ Additional criminal history is attached in Appendix 2.2.
- ☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- ☐ The prior convictions listed as numbers _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	0	IV	3-9 MONTHS	None		10 YRS \$20,000

* (F) Firearm, (D) Other deadly weapons, (RPh) Robbery of a pharmacy, (CSG) criminal street gang involving minor, (P16) Passenger(s) under age 16.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

2.4 ☐ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

☒ The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

☐ (Name of agency) _____ 's costs for its emergency response are reasonable. RCW 38.52.430 (effective August 1, 2012).

2.6 ☐ Felony Firearm Offender Registration. The defendant committed a felony firearm offense as defined in RCW 9.41.010. (Any felony involving a firearm, any RCW 9.41 offense, drive-by shooting, theft of a firearm or possession of stolen firearm).

☐ The court considered the following factors:

☐ the defendant's criminal history.

☐ whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

☐ evidence of the defendant's propensity for violence that would likely endanger persons.

☐ other: _____

☐ The court decided the defendant ☐ should (if checked, 5.5(b) below applies) ☐ should not register as a felony firearm offender.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the county jail:

4 months on Count 1 _____ months on Count _____

Actual number of months of total confinement ordered is: 4 months

All counts shall be served concurrently, except for the following which shall be served consecutively:

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____

Confinement shall commence immediately unless otherwise set forth here: _____

☐ **Partial Confinement.** The defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: _____

☐ work crew RCW 9.94A.725
☐ work release RCW 9.94A.731

☐ home detention RCW 9.94A.731, .190

☐ **Conversion of Jail Confinement (Nonviolent and Nonsex Offenses).** RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option, to reduce the time spent in the community option by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

☐ The defendant shall receive credit for time served in an available county supervised community option prior to sentencing. The jail shall compute time served.

☒ **Alternative Conversion.** RCW 9.94A.680. 30 days of total confinement ordered above are hereby converted to 240 hours of community restitution (service) (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Correction (DOC) to be completed on a schedule established by the defendant's community corrections officer but not less than 20 hours per month.

☒ **Alternatives to total confinement** were not used because of: insufficieint resources, agreement
☒ criminal history ☐ failure to appear (finding required for nonviolent offenders only) RCW 9.94A.680.

(b) **Credit for Time Served:** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

4.2 Community Custody. RCW 9.94A.505, .702.

(A) The defendant shall serve 12 months (up to 12 months) in community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed

on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.701 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(1)(a) and for offenses after June 12, 2008 for unlawful possession of a firearm with a finding that the defendant was a member or associate of a criminal street gang. The defendant shall report to DOC not later than 72 hours after release from custody at the address provided in open court or by separate document.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

- ☒ consume no alcohol.
- ☐ have no contact with: _____
- ☒ remain ☒ within ☐ outside of a specified geographical boundary, to wit: Washington State unless approved by CCO—see Appendix H.
- ☐ participate in the following crime-related treatment or counseling services: _____
- ☐ undergo an evaluation for, and fully comply with, treatment for ☐ domestic violence ☐ substance abuse ☐ mental health ☐ anger management.
- ☒ comply with the following crime-related prohibitions: Not possess dangerous weapons.
- ☒ Other conditions: See Appendix H

(C) The conditions of community custody shall begin immediately upon release from confinement unless otherwise set forth here: _____

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

PCV	\$ 500	Victim assessment	RCW 7.68.035
PDV	\$	Domestic Violence assessment	RCW 10.99.080
CRC	\$ 200	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ 200	FRC
		Witness costs \$	WFR
		Sheriff service fees \$	SFR/SFS/SFW/WRF
		Jury demand fee \$	JFR
		Extradition costs \$	EXT
		Other \$	
PUB	\$ 250	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$	DUI fines, fees and assessments	
CLF	\$	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
	\$ 100	DNA collection fee	RCW 43.43.7541

FPV \$ _____ Specialized forest products RCW 76.48.140

\$ _____ Other fines or costs for: _____

DEF \$ _____ Emergency response costs (\$1,000 maximum, \$2,500 max. effective Aug. 1, 2012) RCW 38.52.430

Agency: _____

RTN/RJN \$ _____ Restitution to: _____

\$ _____ Restitution to: _____

\$ TBD Restitution to: Annie Booth

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

\$ _____ **Total** RCW 9.94A.760

☒ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☒ shall be set by the prosecutor.

☐ is scheduled for _____ (date).

☒ The defendant waives any right to be present at any restitution hearing (sign initials): _____

☐ **Restitution** Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJN

☐ The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

☒ All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 35.00 per month commencing one month after entry of this Judgment and Sentence or one month after release from custody; unless the defendant enters into a time payment agreement with the Clerk of the Court. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense RCW 43.43.754.

☐ **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

- ☒ The defendant shall not have contact with ANNABELL BOOTH (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until 10/23/2025 (which does not exceed the maximum statutory sentence).
- ☒ The defendant is excluded or prohibited from coming within 300 feet (distance) of: the above-named protected person(s)'s ☒ home/ residence ☒ work place ☐ school ☐ (other location(s)) _____, or ☐ other location _____ until _____ (which does not exceed the maximum statutory sentence).
- ☐ A separate Domestic Violence No-Contact Order, Stalking No-Contact Order, or Antiharassment No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 Other:

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Exoneration: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5a Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's

driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b Felony Firearm Offender Registration. If the court has determined that the Defendant should be required to register in section 2.6 above, this section applies and the defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved.

5.7 ☐ Department of Licensing Notice: The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. **Clerk's Action** -The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285. **Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):**

☐ Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of ____;

☐ No BAC test result.

☐ BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.

☐ Drug Related. The defendant was under the influence of or affected by any drug.

☐ THC level was _____ within two hours after driving.

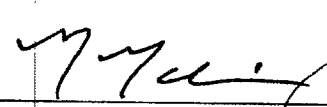
☐ Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.


Vehicle Info.: ☐ Commercial Veh. ☐ 16 Passenger Veh. ☐ Hazmat Veh.

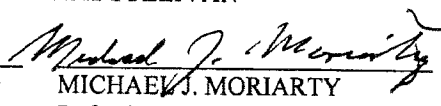
5.8 Other: _____

Done in Open Court and in the presence of the defendant this date: 10/23/15


Judge/MICHAEL SULLIVAN


MARK MCCLAIN WSBA#30909
Prosecuting Attorney

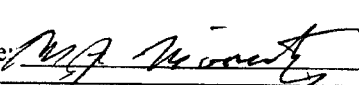

DAVID HATCH, WSBA#21310
Attorney for Defendant


MICHAEL J. MORIARTY
Defendant

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: 

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter _____

Print Name _____

VI. Identification of the Defendant

SID No. WA28044714

Date of Birth 03/29/1939

(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

FBI No. 607177FH1

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

☐ Asian/Pacific Islander

☐ Black/African-American

☒ Caucasian

☐ Native American

☐ Other: _____

Ethnicity:

☐ Hispanic

☒ Non-Hispanic

Sex:

☒ Male

☐ Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, ~~Deputy Clerk~~, _____

Dated: 10-23-2015

The defendant's signature:

Left four fingers taken simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken simultaneously



JUDGMENT AND SENTENCE (FELONY) APPENDIX "H" ADDITIONAL CONDITIONS OF SENTENCE

4.3 Continued: Additional conditions of sentence are:

[X] Defendant shall serve the community custody term defined in section 4.2 above. Defendant shall report to the Department of Corrections (DOC), by phone at (360)533-9758 or (360)942-4817, within 72 hours of the commencement of community custody and the defendant shall comply with all rules, regulations and requirements of the Department of Corrections, and any other conditions of community custody stated in this Judgment and Sentence;

[X] Must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence, in which the offender lives or has exclusive/joint control/access.

[X] Defendant shall report to and be available for contact with the assigned community corrections officer as directed;

[X] Defendant shall work at department-approved education, employment, or community restitution, or any combination thereof;

[X] Defendant shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

[X] Defendant shall pay supervision fees as determined by the Department;

[X] The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement;

[X] The Defendant shall remain within, or outside of, a specified geographical boundary as approved by DOC.

[X] ~~The Defendant shall participate in crime-related treatment or counseling services, which shall include a drug and alcohol evaluation and comply with any recommended services and treatment.~~ *specifically a mental*

[X] The Defendant shall not possess or consume alcohol or marijuana during the term of community custody

[X] The Defendant shall not possess dangerous weapons;

[X] The defendant shall comply with any crime-related prohibitions;

[] The defendant shall have no direct or indirect contact with ANNABELLE BOOTHE

*health
evaluation
&
treatment*

**IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR PACIFIC COUNTY**

STATE OF WASHINGTON,

Plaintiff

vs.

MICHAEL J. MORIARTY,

Defendant.

NO. 15-1-00079-7

WARRANT OF COMMITMENT

STATE OF WASHINGTON

TO: The Sheriff of Pacific County.

The defendant named above, pled guilty in the Pacific County Superior Court of the State of Washington of the crime as charged in the information and the Court has ordered that the defendant be punished by serving the determined sentence of:

☒ **Count I** 4 months; **Count II** - _____ months.

☐ _____ (day(s) (month(s)) of partial confinement in the County jail.

☐ _____ (month(s)) of total confinement in the Pacific County jail.

Defendant shall receive credit for time served to this date.

☒ YOU, THE SHERIFF, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence in the Pacific County Jail.

☐ YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

☐ The defendant is committed for up to thirty (30) days evaluation at Western State Hospital or Eastern State Hospital to determine amenability to sexual offender treatment.

YOU THE SHERIFF ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections pending delivery of the proper officers of the Secretary of the Department of Social and Health Services.

YOU, THE PROPER OFFICERS OF THE SECRETARY OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ARE COMMANDED, to receive the defendant for evaluation as ordered in the Judgment and Sentence.

DATED this 23 day of Oct, 2015.

By Direction of the Honorable

MICHAEL SULLIVAN



JUDGE

CLERK

BY:

DEPUTY CLERK

cc: Prosecuting Attorney
Defendant's Lawyer
Defendant
Jail ✓
Institutions (3)

SG ✓

Appendix D

ORDER AMENDING JUDGMENT AND SENTENCE

FILED

2015 DEC 11 PM 4:03

VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY _____ DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff

vs.

MICHAEL J. MORIARTY

Defendant.

Case No. 15-1-00079-7

ORDER AMENDING JUDGMENT
AND SENTENCE

THIS CAUSE coming on for hearing on oral motion of Plaintiff for an order amending the Judgment and Sentence entered herein on **October 23, 2015**.

IT IS HEREBY ORDERED that the Judgment and Sentence entered herein on **October 23, 2015** is hereby amended under Section 4.1 the 30 days converted to 240 hours of community service is terminated due to the crime pled is a violent offense and not eligible for community service.

IT IS FURTHER ORDERED that the defendant shall complete 3 months of and 30 days of electronic home monitoring or work release. confinement. All other conditions shall remain in full force and effect. for a total of 4 months.

DATED this 11 day of December, 2015.


JUDGE

64

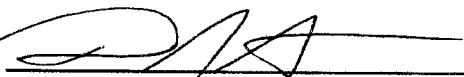
1 Presented by:

2  39439 for

4 MARK MCCLAIN WSBA#30909

5 Prosecuting Attorney

6 Approved by:

7 

8 DAVID HATCH, WSBA#21310

9 Attorney for Defendant

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,)
)
 Respondent/Cross-Appellant,)
)
 MICHAEL MORIARTY,)
)
 Appellant/Cross-Respondent.)
)

No. 48337-8-II

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
 County of Pacific)

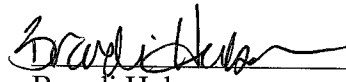
The undersigned being first duly sworn on oath deposes and states: That on the 20th day of June, 2016, affiant delivered by electronic mail a true and correct copy of Respondent/Cross-Appellant's Brief to:

David Ponzoha
Court of Appeals
Division II
950 Broadway, Ste 300
Tacoma, WA 98402-4454

Barbara Corey
Attorney for Michael Moriarty
902 South 10th Street
Tacoma WA 98405
barbara@bcoreylaw.com

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Dated this 20th day of June, 2016, in South Bend, Washington.


Brandi Huber
Paralegal

PACIFIC COUNTY PROSECUTOR

June 20, 2016 - 3:42 PM

Transmittal Letter

Document Uploaded: 6-483378-Respondent Cross-Appellant's Brief.pdf

Case Name: State of Washington vs. Michael Moriarty

Court of Appeals Case Number: 48337-8

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent Cross-Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Brandi Huber - Email: bhuber@co.pacific.wa.us

A copy of this document has been emailed to the following addresses:

barbara@bcoreylaw.com

mmcclain@co.pacific.wa.us

walker@co.pacific.wa.us